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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY MICHAEL VEGA, JR.,

Defendant and Appellant.

G045866

(Super. Ct. No. 09NF3398)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gary S. Paer, Judge. Affirmed.

Tracy A. Rogers, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Randall Einhorn, Susan Miller and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Anthony Michael Vega, Jr., appeals from a conviction of kidnapping for robbery. (Pen. Code, § 209, subd. (b).)¹ He argues first, that there was insufficient evidence to support the conviction, and second, that the jury instructions relating to this charge were prejudicially misleading, warranting reversal. We disagree with both of defendant's claims and affirm the judgment.

I

FACTS

On November 29, 2008, at about 4:00 in the afternoon, Chin Chai Lee was at home planting flowers in her front yard. A man came up behind her and pulled her up by the arm, while putting a gun at her side. He pushed her to the front door of the house. The front door was locked, so he kicked it in.

The man pulled Chin inside the house and she screamed to her son, "Henry, Henry, there's a burglar here."² Henry came out of his bedroom into the hallway and the man pointed the gun at him. The man then pushed Chin into Henry's room and told the two of them to lie down on the floor, on their stomachs. They complied. The man said, "If you don't move, we won't hurt you." He also asked if anyone else was in the house.

The man kept asking where money and the safe were. While Chin and Henry were lying on the floor, the man who had herded them into the bedroom was talking to a second man who had entered the house. The first man stood guard over Chin and Henry while the second man was elsewhere in the house. Henry said the first man used a walkie-talkie to speak to a third man, who was waiting outside with a car.

¹ All subsequent statutory references are to the Penal Code unless otherwise specifically stated.

² "Hereafter, we refer to the parties by their first names, as a convenience to the reader. We do not intend this informality to reflect a lack of respect. [Citation.]" (*In re Marriage of Balcof* (2006) 141 Cal.App.4th 1509, 1513, fn. 2.)

The burglars cut the telephone lines. One used a shirt to tie up Henry, but they did not tie up Chin. After Chin and Henry heard the men drive off, they went to a neighbor's house to call for help.

They saw that all the rooms were messed up as though the men had gone through every one. Cash, jewelry and other items had been taken.

II

DISCUSSION

A. *Kidnapping for Robbery:*

Defendant first argues that there was insufficient evidence to show that he committed kidnapping for robbery. He also argues that, given this, his conviction for kidnapping for robbery violates his due process and fair trial rights. Inasmuch as we conclude there is substantial evidence supporting the jury's finding, we disagree.

(1) Standard of Review—

“““To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.”” [Citations.]” (*People v. Burney* (2009) 47 Cal.4th 203, 253.) “[R]eview for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320.)” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) Further, the reviewing court “presume[s] in support of the judgment ‘the existence of every fact the trier could reasonably deduce from the evidence.’ [Citation.]” (*People v. Vines* (2011) 51 Cal.4th 830, 869.)

(2) *Penal Code section 209*—

California statutory law provides that, “[a]ny person who kidnaps or carries away any individual to commit robbery [or] rape” is guilty of aggravated kidnapping “if the movement of the victim is beyond that merely incidental to the commission of, *and* increases the risk of harm to the victim over and above that necessarily present in, the intended underlying offense.” (§ 209, subd. (b)(1), (2), italics added.) California case law characterizes this as a two-part test. (*People v. Robertson* (2012) 208 Cal.App.4th 965, 980, 983; *People v. James* (2007) 148 Cal.App.4th 446, 453-454.) The two prongs of this test are “not mutually exclusive, but interrelated.” (*People v. Rayford* (1994) 9 Cal.4th 1, 12; accord, *People v. Robertson, supra*, 208 Cal.App.4th at p. 983.) Hence, whether the movement was merely incidental to the commission of the intended underlying offense is related to whether the movement increased the risk of harm to the victim. Defendant argues that neither prong has been satisfied in the instant case.

(3) *Incidental Movement*—

In assessing the first prong, regarding whether there was more than incidental movement, the distance the victim was forcibly moved is relevant but not dispositive. (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1152.) Moreover, “There is . . . no minimum distance a defendant must move a victim to satisfy the first prong. [Citations.]” (*People v. Vines, supra*, 51 Cal.4th at p. 870.) Rather, the inquiry takes into account the surrounding circumstances, including the nature of the crime and the environment in which the victim was moved. (*People v. Dominguez, supra*, 39 Cal.4th at pp. 1152-1153.) The elements of the crime are unsatisfied where the change in location is trivial and has “no bearing on the evil at hand.” (*People v. Daniels* (1969) 71 Cal.2d 1119, 1138, fn. omitted, superseded by statute on another point as stated in *People v. Robertson, supra*, 208 Cal.App.4th at p. 980.)

Chin was taken a distance of 25 feet from the spot where she was gardening to the front door. It was another 10 feet from the front door to where the hallway began. The hallway within the house was a further 22 feet long. The total distance Chin was forcibly moved to Henry's bedroom is unclear, but appears to have been no more than 60 feet.

Defendant states that because the movement of Chin only facilitated the commission of the robbery, it must have been incidental, and therefore does not support the conviction of kidnapping for robbery. Conversely, the prosecution states that *because* Chin's forced movements were unnecessary for the robbery, the conviction must be affirmed. As we view it, forcing Chin inside certainly facilitated the robbery, as it reduced the likelihood that defendant and his accomplices would be detected. By corralling Chin and Henry in one room where they could be interrogated with greater ease, the movement also aided Vega's search for money and valuables. However, the movement was necessary only to defendant's plan to avoid detection, not to the robbery itself. Further, as we shall discuss, the "necessity" of the movement does not control whether it was merely incidental to the robbery.

Since *People v. Daniels*, *supra*, 71 Cal. 2d 1119 was decided in 1969, courts have wrestled with the relationship between incidental movement and movement necessary to the target crime. The Supreme Court in *Daniels* held that because the defendants' "primary intent" was to commit robberies and rapes, and the brief movements of the victims from room to room were "solely to facilitate such crimes" rather than to move the victims "just for the sake of moving" them, there had been no violation of section 209. (*Id.* at pp. 1130-1131, 1140.) This suggested that only movement that was unnecessary to the commission of a robbery or rape would suffice for aggravated kidnapping. (*Id.* at pp. 1139-1140.)

Following this suggestion, many appellate courts have held that where the movement is “unnecessary,” gratuitous, or excessive for the commission of the rape or robbery, then aggravated kidnapping has been committed. (See *People v. Corcoran* (2006) 143 Cal.App.4th 272, 279-280 [“seclusion of the victims in the back office under threat of death was clearly ‘excess and gratuitous’” supporting the kidnapping for robbery convictions]; *People v. Leavel* (2012) 203 Cal.App.4th 823, 835 [movement of the victim between different rooms in her house was “unnecessary,” requiring affirmation of the conviction].) Conversely, where the movement is “integral” to the target offense, a court has overturned the kidnapping for robbery conviction. (*People v. John* (1983) 149 Cal.App.3d 798, 806-807.) However, where the movement of the victim is only necessary to evade detection, but not inherent in the underlying crime, aggravated kidnapping has been affirmed. (*People v. Salazar* (1995) 33 Cal.App.4th 341, 347.)

Notwithstanding this line of authority, sometimes movement that is arguably necessary to complete the target offense is nonetheless held to be merely incidental to that crime and thus not supportive of a conviction for kidnapping for robbery. (See *People v. Washington* (2005) 127 Cal.App.4th 290 [the movement of a victim within a bank’s premises to open a vault].) Thus, whether the movement is necessary to the underlying crime is not determinative of whether the movement can support a conviction for aggravated kidnapping.

Here, Chin was forcibly moved a maximum of 60 feet. Defendant cites certain cases in which movement of a similar or greater distance was held insufficient for kidnapping.³ The prosecution, on the other hand, cites cases in which smaller distances

³ He cites, for example, *People v. Hoard* (2002) 103 Cal.App.4th 599, 607, where jewelry store employees were moved 50 feet into a back room. However, just because a victim is moved a similar or greater distance does not mean there is a substantial change in the victim’s environment.

were deemed sufficient.⁴ However, much more important than the number of feet traveled is whether the “scope and nature of the movement . . . changed the environmental context” of the crime. (*People v. Diaz* (2000) 78 Cal.App.4th 243, 248.) Because Chin was physically moved inside from a relatively safe and publicly visible place, her environment was radically changed, supporting a kidnapping for robbery conviction.

Defendant is correct that there is no per se “indoor-outdoor” rule that mandates affirmation of aggravated kidnapping where the victim is forced indoors by an attacker. (*People v. James, supra*, 148 Cal.App.4th at p. 456.) Nevertheless, this is generally the result because moving the victim indoors, or even behind a structure, greatly alters the environment in which the target crime may occur. Hence, California courts have affirmed convictions for aggravated kidnapping where the victim was moved from outside to inside a residence or business in order to perpetrate a robbery. In *People v. Ellis* (1971) 15 Cal.App.3d 66, the dismissal of kidnapping for robbery charges was reversed where robbery victims were forced upstairs and inside their apartments at knifepoint, because the movement played a “significant role in the crimes of robbery” and could not be called “trivial changes of location.” (*Id.* at p. 73.)

⁴ Most of the cases cited by the prosecution involve kidnapping for rape. (See, e.g., *People v. Salazar, supra*, 33 Cal.App.4th at p. 344 [victim moved 29 feet into a motel room]; *People v. Shadden* (2001) 93 Cal.App.4th 164, 167 [victim dragged nine feet to the back room of a video store]; *People v. Rayford, supra*, 9 Cal.4th at p. 6 [victim moved 105 feet and behind a wall].) While kidnapping for robbery and kidnapping for rape are defined by the same statute, shorter distances are usually deemed sufficient in kidnapping for rape cases. This is because robberies of a home or business often necessarily entail a certain amount of movement, while “a rape involves solely an attack on the person and does not necessarily require movement to complete the crime.” [Citation.]” (*People v. Diaz, supra*, 78 Cal.App.4th at p. 248.) The kidnapping for rape authority cited is therefore not controlling.

Likewise, in *People v. James, supra*, 148 Cal.App.4th 446, movement was found not incidental where an employee was forced to enter a bingo club at gunpoint in connection with the robbery of the club. (*Id.* at pp. 449, 457.) The court stated that while an employee or manager of a business may be subject to movement within the premises to search for valuables, the risks associated with movement “from the relative safety of the outdoors, into the business premises for the duration of the robbery” were greater than the risks inherent in the robbery of a business. (*Id.* at p. 457.) Saliently, the court concluded: “That defendant and his associates chose to commit this robbery by the means of bringing [the employee], at gunpoint, to the door of the Bingo Club does not make the movement of [the employee] merely incidental to the robbery; it means that defendant committed the robbery by means of a kidnapping, and was therefore properly convicted of aggravated kidnapping.” (*Id.* at p. 458.)

In the present case, the movement of Chin was a relatively short 50 to 60 feet. While forcing Chin indoors may have been necessary for the commission of the robbery, or at least defendant’s particular plan for the offense, this does not make the movement a trivial change in location. Crossing the threshold into her house markedly changed the context in which the robbery occurred. Chin was forced from her garden, a position that allowed her the relative safety of a publicly viewed space, into a bedroom. The distance, while relatively small, allowed defendant the privacy to control and menace Chin. We therefore conclude that there is sufficient evidence to support the jury’s finding that Chin’s movement was not merely incidental to the robbery.

(4) *Increased Risk of Harm—*

Defendant also claims that the second prong of the kidnapping for robbery test is not satisfied because defendant’s forced movement of Chin from the garden to the bedroom did not substantially increase her risk of harm. In making this argument, defendant is relying on outdated case law. (*People v. Robertson, supra*, 208 Cal.App.4th at p. 981.)

The Supreme Court in *People v. Vines*, *supra*, 51 Cal.4th 830, in addressing convictions for kidnapping for robbery, stated: “At the time of the crimes, kidnapping for robbery, or aggravated kidnapping, required movement of the victim that (1) was not merely incidental to the commission of the robbery, and (2) substantially increased the risk of harm over and above that necessarily present in the crime of robbery itself. [Citations.]” (*Id.* at p. 869, fn. omitted.) In a footnote, it explained: “At the time of defendant’s crimes, aggravated kidnapping, codified in section 209, subdivision (b), was defined as kidnapping to commit robbery. In 1997, the Legislature revised the statute to define aggravated kidnapping as kidnapping to commit robbery or certain sex offenses, and modified the asportation standard by eliminating the requirement that the movement of the victim ‘substantially’ increase the risk of harm to the victim. [Citations.]” (*People v. Vines*, *supra*, 51 Cal.4th at p. 869, fn. 20.) In other words, the Supreme Court in *Vines* applied the two-prong test applicable prior to the amendment of the statute.

The second prong of the test applicable to the amended statute, however, “‘does *not* require that the movement “substantially” increase the risk of harm to the victim.’ [Citation.]” (*People v. Robertson*, *supra*, 208 Cal.App.4th at p. 980.) Defendant in the matter before us committed the crimes in question in 2008, well after the amendment of section 209. Consequently, the requirement of the outdated version of the two-prong test, that the movement of the victim “substantially” increase the risk of harm, is inapplicable. Rather, the second prong of the current test “requires the People to prove beyond a reasonable doubt that the appellant’s movement of the victim . . . increased the risk of harm to the victim over and above that which is inherent in the [underlying] offense itself. Yet, section 209, subdivision (b)(2) does not require proof that the movement *substantially* increased the risk of harm to the victim.” (*People v. Robertson*, *supra*, 208 Cal.App.4th at p. 982.) We turn now to the question of whether the evidence was sufficient to satisfy the second prong of the current test.

The second prong of the test focuses on whether the movement subjected the victim to risk above that inherent in the underlying crime, such as whether the movement decreased the likelihood of detection, prevented the victim's escape, or gave the perpetrator the opportunity to commit additional crimes. (*People v. Dominguez, supra*, 39 Cal.4th at p. 1152.) The movement of Chin into the house substantially decreased the visibility of the robbery and hence decreased the likelihood of a passerby coming to her aid. Moving both Chin and Henry into the bedroom, forcing them to lay face down on the floor, and tying Henry's arms allowed defendant to gain full control over them, preventing their escape. While Chin and Henry were not subject to physical abuse while under the control of defendant, this court looks not to whether the dangers of asportation and confinement actually materialized, but merely whether the *risk* of such harm was increased. (*People v. Vines, supra*, 51 Cal.4th at p. 870.)

"The essence of aggravated kidnapping is the increase in the risk of harm to the victim caused by the forced movement. [Citation.]" (*People v. Dominguez, supra*, 39 Cal.4th at p. 1152.) Vega forced Chin indoors while pressing a gun to her side. This violent act and the change in Chin's environment that resulted provide sufficient evidence to support the jury's finding of kidnapping for robbery.

B. Jury Instructions:

In addition, defendant claims the court gave a faulty jury instruction, the error was prejudicial, and he was denied his constitutional rights to due process, a fair trial and a jury determination of guilt. Defendant did not object to the kidnapping for robbery instructions at trial. Nevertheless, to the extent that defendant's substantial rights are implicated, the claim is cognizable by the reviewing court. (*People v. Carey* (2007) 41 Cal.4th 109, 129.) We conclude that the instructions given to the jury were an accurate statement of the law.

Pursuant to CALCRIM No. 1203, the jury was instructed as follows: “The defendant is charged in Count 1 with kidnapping for the purpose of robbery in violation of Penal Code section 209(b). [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant intended to commit robbery[;] [¶] 2. Acting with that intent, the defendant took, held, or detained another person by using force or by instilling a reasonable fear; [¶] 3. Using that force or fear, the defendant moved the other person or made the other person move a substantial distance; [¶] 4. The other person was moved or made to move a distance beyond that merely incidental to the commission of a robbery; [¶] 5. When that movement began, the defendant already intended to commit robbery; AND [¶] 6. The other person did not consent to the movement[.] [¶] As used here, substantial distance means more than a slight or trivial distance. The movement must have substantially increased the risk of physical or psychological harm to the person beyond that necessarily present in the robbery. In deciding whether the movement was sufficient, consider all the circumstances relating to the movement.”

Defendant contends that because the instructions do not list as a separate element that the movement must subject the victim to a substantial increase in the risk of harm, but rather include that requirement in the paragraph explaining “substantial distance,” the instruction was inaccurate and prejudicial. This argument is without merit.

“‘[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.’ [Citation.]” (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) Further, ““Jurors are presumed to be intelligent, capable of understanding instructions and applying them to the facts of the case.”” [Citations.]” (*People v. Carey, supra*, 41 Cal.4th at p. 130.) While a substantial increase in the risk of harm is not an enumerated element of CALCRIM No. 1203, the instructions taken as a whole quite clearly require *both* that the distance the victim was forcibly moved must be more than slight or trivial *and* that the movement *substantially* increase the risk of harm to the victim. The

instruction thus required that the second prong of the section 209, subdivision (b)(2) test be satisfied, and then some.

In other words, the instructions employed an outdated version of the two-prong test. The instructions given required the People to meet a higher burden of proof than that currently required under the law. This instruction was to the advantage defendant, not to his disadvantage. Consequently, the error was harmless. (*People v. Lamas* (2007) 42 Cal.4th 516, 526.)

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.